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TARGETING THE HEAD OF STATE DURING THE GULF CONFLICT,
A LEGAL ANALYSIS

by

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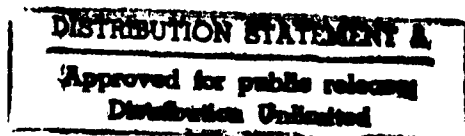
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<p>This paper will address the question of whether it would be an illegal assassination for U.S. Armed Forces to kill the leader of an enemy state during a period of armed conflict, if the United States had specifically identified the leader as a target beforehand. A review of the relevant provisions of Executive Order 12333, the Hague Conventions, the Geneva Conventions, and the United Nations Charter indicate that, during a period of armed conflict, the United States may lawfully conduct a deliberate attack on a foreign leader who is also invaluable to the enemy's armed forces. Therefore, the author concludes that with the approval of the National Command Authorities, General Norman Schwarzkopf, Commander-in-Chief of the United Central Command could have specifically identified Saddam Hussein as a target during the Gulf Conflict, and that the killing of the Iraqi leader by U.S. Armed Forces would not have been illegal or an assassination.</p>			
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TARGETING THE HEAD OF STATE DURING THE GULF CONFLICT, A LEGAL ANALYSIS

CHAPTER I

INTRODUCTION

After the Iraqi invasion of 2 August 1990, Kuwait was ravaged, its people were forced from their homes, terrorized, subjected to murder, and its national integrity was destroyed. However, when General Michael J. Dugan stated that if war occurred with Iraq, United States planes would seek to target and decapitate Saddam Hussein, his family, and his mistress, Secretary of Defense Dick Cheney relieved him as Air Force Chief of Staff. Secretary Cheney stated that General Dugan's proposed action was potentially a violation of Executive Order 12333 which banned assassination. Additionally, the proposed targeting of noncombatants such as Hussein's family and mistress were clear violations of international law. This incident also served to refocus America's attention on the legal and moral justification of killing a foreign head of state. The dilemma is to determine whether the intentional killing of a foreign leader who has initiated armed international aggression, would be a preferable and legal alternative to risking the lives of thousands of

Coalition and Iraqi military personnel. (1) (2) (3) (4)

The premise of the paper is that during a period of armed conflict neither the Executive Order 12333, the Hague Conventions, the Geneva Conventions, or the United Nations Charter prohibit the United States from conducting a deliberate attack upon a foreign leader who also serves as the commander-in-chief of the enemy armed forces. Accordingly, this paper will address some of the legal and political advantages and disadvantages of conducting such an attack.

CHAPTER II

EXECUTIVE ORDER 12333

Peacetime Ban on Assassination.

Executive Order 12333 prohibits assassination and was first published during President Gerald Ford's Administration. Paragraph 2.11 provides "Prohibition on Assassination. No person employed by or acting on behalf of the US Government shall engage in, or conspire to engage in assassination." Paragraph 2.12 provides "Indirect Participation. No agency of the Intelligence Community shall participate in or request any person to undertake activities forbidden by this Order." Although the Executive Order did not define assassination, the term is normally considered an act of murder for political purposes.

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Its targets are not restricted to individuals of political eminence. The unlawful killing of private individual, if conducted for political reasons is also an assassination. However, murders that have no political goal or objective are also crimes and are subject to retribution, but these crimes should not be construed as assassinations. (5) (6) (7) (8)

The historical background of the Executive Order indicates that it was adopted after disclosures of alleged Central Intelligence Agency (CIA) participation in efforts to assassinate foreign leaders. Both the House and Senate investigated these alleged CIA ventures. The Senate Select Committee in November 1975 concluded that the United States had been involved in five assassinations or attempted assassinations of foreign leaders during the fifteen prior years: "Patrice Lumumba, Premier of the Congo; Fidel Castro, Premier of Cuba; Rafael Trujillo, strongman of the Dominican Republic; Ngo Dinh Diem, President of South Vietnam; and Rene Schneider, Commander-in-Chief of the Army of Chile, who opposed a military coup against President Salvador Allende." The Committee also concluded that the CIA had participated in these acts without the explicit approval of the President and that many of the United States governmental officials believed that such conduct was authorized. The Committee then proposed legislation that made it a felony for any federal official to assassinate, attempt to assassinate, or conspire to assassinate a foreign leader if the United States was not at war or involved in armed conflict with his country.

However, no legislation was enacted by the Congress. It has been argued that Congress' failure to pass legislation prohibiting assassination was tacit approval for the President to retain it as a policy alternative. Nevertheless, in 1976, the original Executive Order banning assassination was promulgated by President Ford. (9) (10)

Those who advocate an expansive interpretation of the Executive Order contend that even during periods of armed conflict, the order prohibits federal personnel from intentionally causing, aiding, abetting, or incidentally causing the death of a foreign leader or any designate individual. However, it is clear that the restriction on assassination was promulgated in answer to allegations regarding the murders of foreign leaders and others for political purposes. Furthermore, it is clear that the types of killings denounced did not suggest that the Executive Order should be interpreted to prohibit legitimate killings conducted in self defense against foreign leaders or others who attack interest vital to the United States or its allies. A review of the law of armed conflict also supports restricting the assassination ban to murders for political purposes. (11) (12) (13)

CHAPTER III

CUSTOMARY INTERNATIONAL LAW

The Right to Kill During Armed Conflict.

The first attempt to codify the law of armed conflict occurred in the 1860's. The Lieber Code was published by the United States Army in 1863 as General Order No. 100: Instructions for the Government of Armies of the United States in the Field. Paragraph 148 of the Lieber Code provides: "Assassination. The law of war does not allow proclaiming either an individual belonging to a hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the modern law of peace allows such international outlawry; on the contrary, it abhors such outrage. The sternest retaliation should follow the murder committed in consequence of such proclamation, made by whatever authority. Civilized nations look with horror upon offers or rewards for the assassination of enemies as relapses into barbarism." (14) (15)

The adoption of the code was extensive, and it was the basis for subsequent military manuals of the American and the Prussian armies. It also remains as a model for today's armed forces. For instance, today a captured combatant may not be arbitrarily killed, no matter how reprehensible his alleged prior misconduct.

Nevertheless, the code was never interpreted to restrict military assaults on individual soldiers or officers, subject to appropriate legal restraints. (16) (17)

Furthermore, paragraph 31 of U.S. Army Field Manual 27-10 provides: "It is especially forbidden ... to kill or wound treacherously individuals belonging to the hostile nation or army." (Article 23b, Hague Convention IV, 1907) This article is understood as precluding assassination, proscription, or outlawry of a belligerent, or setting a value upon a belligerent's head, as well as proposing a bounty for the belligerent "dead or alive". It does not, however, prohibit attacks on enlisted members or officers of the belligerent force whether in the area of hostilities, occupied territory, or elsewhere. (18) (19)

Additionally, this restriction supplements the ban regarding the denial of quarter mentioned in paragraphs 28 and 29 of U.S. Army Field Manual 27-10 that makes it unlawful to decline an enemy's capitulation or to kill those who capitulate: "It is especially forbidden ... to declare that no quarter will be given." (Article 23d, Hague Convention IV, 1907) "It is especially forbidden ... to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion." (Article 23c, Hague Convention IV, 1907) (20) (21) (22)

However, during a period of armed conflict, international law also provides that combatants have the fundamental right to

kill (as opposed to assassinate) by using deadly force against any lawful belligerent or any unlawful belligerent who participates in the hostilities. Belligerents are authorized to attack any enemy belligerent including but not limited to administrative, command, combat, and combat service support personnel. Generally, belligerents are subject to attack at any time or place, notwithstanding their position when attacked. Nor does the ban on assassination place a restriction on the number of lawful means that may be used in conducting the attack. Air, naval, infantry, or special operation forces may be lawfully utilized in such attacks. Therefore, if the individual targeted is a belligerent, the use of a specific lawful method for attack will not make a lawful attack illegal or an assassination.

Similarly, the killing of noncombatants incidental to a lawful attack on a military target is not an assassination or illegal. One of the bitter but acknowledged results of armed conflict is that there will likely be collateral deaths of noncombatants as an aftermath of lawful attacks. (23) (24) (25) (26)

Furthermore, international law does not prohibit the attack on belligerents with the aim of causing their deaths rather than their physical seizure as long as those who attempt to surrender are allowed to do so when the events allow. For instance, the killing of a belligerent who, in the midst of a fire fight, drops his weapon and attempts to surrender would not be unlawful or an assassination. The rule is to be reasonable under the

circumstances. (27) (28) (29)

Therefore, such attacks do not produce assassinations unless conducted in a treacherous fashion, as banned by Article 23b, Hague Convention IV, 1907. In addressing the term treachery, paragraph 50 of U.S. Army Field Manual 27-10 provides that ruses of war are lawful if they do not include treachery or perfidy on the part of the combatant using them. They are, however, prohibited if they violate any generally acknowledge precept. The line of demarcation between lawful ruses and banned acts of perfidy is oftentimes blurred, but the following examples suggest the correct precepts. It would be an unlawful practice to gain an advantage of a belligerent by intentional lying or deceptive conduct which involves a breach of trust, or when there is a moral responsibility to state the truth. For example, it is unlawful to fabricate a surrender in order to gain an advantage over the enemy. Likewise, to announce to the opposing belligerent that an armistice had been accepted when such is not true would also be treacherous. On the other hand, it is a proper ruse to call for an enemy to surrender on the basis that it is surrounded and thereby prompt such surrender with a modest force. Treacherous or perfidious activity in armed conflict is proscribed because it destroys the basis for reestablishment of peace short of the total extermination of one combatant by another. (30) (31) (32)

Attacks on Designated Personnel.

Additionally, targeting of designated officers have been allowed and the legitimacy of such attacks have been accepted without considerable dissension. As previously stated all belligerents are liable to attack at any time so long as the means utilized are compatible with the law of armed conflict. It is irrelevant whether the belligerent is enlisted, officer, or the king. The implementation of this theory was portrayed by two events that took place in World War II and the Korean War. One occurred on 18 April 1943, when the United States received evidence involving the exact time Japanese Admiral Osoruko Yamamoto would travel from Rabaul. Because Admiral Yamamoto was deemed essential to the Japanese war endeavor, the United States decided it would attempt to attack his plane. A number of United States planes were deployed for that objective and Admiral Yamamoto was killed. Since he was a belligerent, the attack was lawful under international law. The next event took place on 30 October 1951 when a naval airstrike killed 500 senior Chinese and North Korean military officials involved in a war meeting at Kapsan, North Korea. (33) (34) (35)

Attacks Conducted by Partisans.

Historically, belligerents have worn uniforms to set themselves apart from the civilian inhabitants. The law of

armed conflict prior to World War II prohibited masquerading as civilians in order to conduct an assault. However, as a result of the dependence on partisans (guerrillas/freedom fighters) by all nations involved in World War II, such prohibitions were casted into confusion. Article 4, Geneva Convention Relative to the Treatment of Prisoners of War, 12 August, 1949 provides that members of a partisan movement will be considered legitimate belligerents if they are led by an individual responsible for his subordinates' conduct and actions; wear permanent distinctive insignia which can be recognized from a distance; carry their weapons openly; and observe the laws and usages of war in their combat activities. Accordingly, both state practice and international law have indicated that the utilization of partisans, who comply with Article 4, was lawful and any death of a belligerent that occurred as a result of partisan operations would not constitute an assassination. (36) (37)

Concern that the existence of cloaked belligerents, without uniform or insignia, would threaten the civilians among whom they operated was expressed by the United States and other nations upon the publication of Articles 37 and 44 of Additional Protocol I to the 1949 Geneva Conventions. Article 44 would require all belligerents to differentiate themselves from the civilian inhabitants when getting ready for or participating in hostilities. However, a belligerent who failed to utilize a uniform or insignia because the character of the conflict prevented it would keep his lawful belligerent status if he

carried his arms openly while engaged in an attack.

Article 37 of the Protocol would prohibit causing the death, wounding, or capture of an enemy by perfidious conduct such as: "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Accordingly, these articles were written such that a cloaked belligerent would lose his lawful standing as a combatant only if he failed to carry his arms openly while engaged in an attack. Because of concerns with this and other provisions the United States and many other nations have refused to ratify Protocol I. (38) (39)

Civilians Viewed as Military Objects.

Which civilians should be viewed as military objects, and therefore liable to direct attack is also problematical. While there is harmony between law of armed conflict scholars that civilians who engage in combat should be viewed as belligerents, there is a lack of harmony as to the degree of involvement required to make a civilian a military object subjected to direct attack. Legitimate objects of attack include those targets which by their nature, location, purpose, or use make an effective contribution to the enemy's military action and whose total or partial destruction, capture or neutralization, under the circumstances existing at the time of the attack offers a

definite military advantage to the attacker. Because of the advances in technology, many essential military functions could not be conducted without the participation of a limited portion of a nation's civilian population. Therefore, an office will not be made immune from attack by substituting a civilian in the office typically filled by a member of the armed forces. (40)

Additionally, a person will be vulnerable to lawful attack, if his duty in a civilian assignment is of greater benefit to a country's military defense than that individual's potential military assignment. A person filling a crucial assignment in weapon program considered essential to a country's military defense is an example. The civilian scientists who were employed in the United States nuclear armament program during World War II were also liable to direct attack because their work was of crucial value to the United States war effort. Also during World War II, the killing of the German scientists, involved in Germany's missile program, was considered as vital as the demolition of the missiles. Therefore it would not be considered an assassination to attack a particular civilian who effectively contributes to the enemy's war-fighting effort and whose elimination or death would constitute a definite military advantage to the attacker.

Accordingly, a civilian head of state who functions as the commander-in-chief of the nations' military will also be vulnerable to a legitimate attack during a period of armed conflict. The head of state's death therefore would not be

considered an assassination. However, as matter of comity, attacks on the heads of state normally have been restricted by policy. Black's Law Dictionary (4th Edition, 1968) defines comity as "That body of rules which states observe toward one another from courtesy or mutual convenience, although they do not form part of international law." (41) (42)

CHAPTER IV

SELF DEFENSE

Article 2, United Nations Charter.

If the premise is accepted, as discussed above, that a civilian head of state may be made the object of direct attack because his involvement is vital to the armed forces, then the next logical step is to explore whether such a person can be made the object of attack before hostilities begin. One objective of international law is to deter the unauthorized resort to force by nations. Not only is complying with international law often diplomatically advantageous for states, but the continuation of international collaboration requires states be held to a minimum measure of deportment to escape international chaos. International law purports to create this minimum standard of deportment. Often without an influential enforcement organization, these laws are followed largely out of a sense of

moral responsibility.

The use of force is guided in international law by the United Nations Charter which states in Article 2, paragraph 3 that: "All members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." Paragraph 4 comments on the necessity for peaceful settlement of disputes: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." However, the Article 2 restrictions placed on the use of force by nations is not total, since self-defense is authorized under Article 51 of the United Nations Charter. (43) (44)

Article 51, United Nations Charter .

The United States has traditionally advocated that the United Nations Charter supports the use of force to defend itself and its allies against risks arising from violations of international law. Particularly, Article 51 of the Charter provides: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by Members in

exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security."

Accordingly, the United Nations Charter has authorized nations to take those steps logically called for in their self-defense when confronted with an armed assault. Additionally, Article 51 acknowledges the privilege of self-defense against armed assault, not only for the victim state but also for nations coming to the victim's assistance. The right to self-defense continues until the Security Council takes action to terminate the unlawful assault and return to the status quo ante. (45) (46)

Right to Preemptive Self-Defense.

Although Article 51 is unambiguous, its utilization has caused significant debate. First, individuals who advocate a restrictive approach argue that the ban on the use of force mentioned in Article 2, paragraph 4 is only limited by the exemption founded in Article 51. They contend that the exemption authorizes the utilization of force in self-defense only when a nation is confronted with an existing armed assault. That a right to defend against anticipatory threats was never intended. Instead, a nation must forgo using force unless

embroiled in resisting an ongoing armed assault.

Second, individuals who advocate an expansive approach argue that it is unrealistic to apply a restrictive view to Article 51 in an era of sophisticated weapons and continuing terrorist threats. Such advocates also note the irrationality of compelling a nation to forgo using force in self-defense when an opponent is readying to initiate an assault. In light of the destructive capability of advance weapons and the rapidity of their strike, restricting a nation right to respond prior to an imminent assault in reality eliminates all protection.

Although Article 51 states "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense", it does not explain or suggest what rights are inherent. However, the incorporating of the phrase was regarded as vital by the framers. The preliminary version of Article 51 made no reference to inherent right, but the preliminary version was modified to ensure the term was included in the description of self-defense. Specialists in international law contend that the framers actions were also meant to ensure that Article 51 acknowledged and incorporated all rights of self-defense that existed under earlier provisions of customary international law.

(47) (48) (49)

Nevertheless, during the Gulf Conflict a number of scholars of international law advocated the restrictive approach that only the Security Council was empowered by the United Nations Charter to approve violent self help against Iraq. It was also

contended that what Article 51 of the Charter characterized as the inherent right of self-defense was allowed by the wording of that article only "until the Security Council has taken action necessary to maintain international peace and security."

However, this contention is inharmonious with the Charter's objective. Article 51 validates the right to self help against unlawful assault until the Security Council has instituted actions that are necessary to reestablish peace and security. Otherwise, a nation would be compelled to surrender its right to self-defense as soon as the Security Council took any action, however futile. Certainly, this would not motivate nations to request relief from the Security Council. (50) (51) (52) (53)

Additionally, when acting in self-defense, states are obligated to use only the force necessary, and to ensure that the amount of force used is proportionate to the hostile threat being confronted.

Critics attempting to restrict the right of self-defense turn to Secretary of State Daniel Webster's characterization of preemptive self help in "The Caroline" case of 1837, regarding Canada's claim of self-defense after attacking an American ship, the Caroline. Secretary of State Webster wrote that a nation must show a "necessity for self defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation" and must do "nothing unreasonable or excessive, since the act, justified by the necessity of self defense, must be limited by necessity, and kept clearly within it".

However, the devastating power of modern weapons, as noted earlier, have made the 1837 restrictive comments of Secretary Webster on self-defense unrealistic for the 1990's.

The restrictions of necessity and proportionally are historical limitations on the use of force. However, deference for such historical precepts are sabotaged, when nations are required to assume a substantial danger of harm before they are authorized to use force in self-defense. (54) (55)

Exercising the Right to Preemptive Self-Defense.

If one accepts the theory that states threatened with impending assaults possess the inherent right to protect themselves, self-defense may be initiated both in expectation of the assault and in prompt answer to the actual assault upon their vital interests.

On 12 August, 1990, the Amir of the State of Kuwait wrote the following to President George Bush:

"I am writing this to express the gratification of my government with the determined actions which the Government of the United States and other nations have taken and are undertaking at the request of the Government of Kuwait to deal with Iraqi aggression against Kuwait. It is essential that these efforts be carried forward and the decisions of the United Nation Security Council be fully and promptly enforced. I therefore request on behalf of my government and in the exercise

of the inherent right of individual and collective self defense as recognized in Article 51 of the UN Charter that the United States Government take such military or other steps as are necessary to ensure that economic measures designed to fully restore our rights are effectively implemented. Further, as we have discussed, I request that the United States of America assume the role of coordinator of the international force that will carry out such steps." (56)

Accordingly, the United States and the Coalition forces were authorized to use self-defense both in response to the Iraq's initial assault on Kuwait and in anticipation of a continuing sequence of Iraqi violations of international law.

Traditionally, the United States has employed force where a state has neglected to carry out its international obligations in safeguarding the United States vital interest against unlawful assaults that emanate from the state's territory, or where a state has been liable in assisting others to commit illegal acts against the vital interest of the United States. Accordingly, the United States has acknowledged self-defense in response to an actual use of force, anticipatory self-defense against an immediate threat, and self-defense in response to a continuing risk.

Self-defense has been utilized in many armed conflicts over the last ten years. Self-defense was the core for the United States naval attack on Syrian forces in Lebanon on 4 December 1983, following Syrian strikes against United States naval

aircraft assisting the Marine peacekeeping unit in Beirut. Self-defense was also the core for the attack on the terrorist forces in Libya on 15 April 1986, and self-defense was applicable in December 1989 when United States armed forces conducted a campaign to remove the Panamanian leader General Manuel Noriega. (57) (58) (59)

Decision to Kill a Foreign Leader.

Some critics deny that by killing a head of state, the lives of many combatants will be spared, contending that such reasoning disregards the enemy's sense of nationalism. They argue that it is likely another leader will surface with supporters all the more provoked by the killing of the first leader. Other critics cite the problem of anticipating the final impact of killing the head of state. They note that the lack of political continuity may be more difficult to manage than the deceased leader, and they also note the risk that a deliberate killing of the head of state will encourage acts of revenge against leaders of the United States. Other critics argue that the outcome of the enemy leader's death may be less beneficial than those gained by permitting the combatants to come to decision through armed conflict. (60) (61) (62) (63) (64)

Nevertheless, the right of self-defense will authorize the attack against any state leader whose illegal conduct presents a continuing risk to the United States vital interest. The

echelon or position at which an attack would be conducted against personnel within the enemy state infrastructure will be a policy decision rather than a legal issue.

Additionally, there is no requirement to try to physically seize rather than kill an adversary. In some instances it may be desirable to employ infantry in order to capture an adversary. But, if the National Command Authorities have concluded that the enemy leader presents such a risk to the United States vital interest as to compel the employment of force, it would be lawful and not an assassination to utilize air, naval, and/or infantry attacks against that adversary without first trying to physically seize him. (65) (66) (67)

CHAPTER V

OFFENSES CONSTITUTING WAR CRIMES

Criminal Responsibility of the Head of State.

Any individual, whether a combatant or a private citizen, who carries out an act which constitutes an offense under international law (such as crimes against peace, crimes against humanity, and war crimes) is answerable for such and subject to retribution. In many instances, senior government officials will be answerable for war crimes carried out by subordinate personnel of their armed forces, or any other individual under

their command. Therefore, when subordinates carry out massacres and atrocities against noncombatants or prisoners of war, the accountability may fall not only with the subordinates but also with the senior government official. Such accountability arises directly to the senior government official when the misconduct has been carried out in accordance with his order. The senior government official is also answerable if he knows or should have known through available written or verbal information, that his subordinates or any other individuals under his command are about to carry out or have carried out crimes under international law and he neglects to take the necessary and reasonable actions to assure obedience with the international law or to discipline the violators. (68) (69) (70) (71)

Subsequent to the war crimes trials of World War II, the Geneva Conventions of 1949 defined certain misconduct as "grave breaches," if carried out against individuals or property addressed by the Conventions.

"Grave breaches" include any of the following crimes, if carried out against prisoners of war or noncombatants protected by the Conventions: "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of a fair and regular trial ... taking of hostages and

extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully."

The fact that a individual who carried out or condoned an act which constituted a crime against international law functioned as the head of state or as a duty bound government officer does not free him from culpability for his misconduct.
(72) (73) (74) (75)

CHAPTER VI

CONCLUSIONS

As noted earlier, heads of state, such as Saddam Hussein, are legitimated targets during a period of general armed conflict or when self-defense is being exercised, but have not been routinely targeted due to comity. However, a head of state should be held to have forfeited any immunity from direct attack due to comity, where there is substantial evidence that an enemy armed force has committed grave breaches of international law, that the enemy head of state has actual knowledge or should have knowledge through information offered to him about such crimes, and head of state has refused to take immediate action to terminate the illegal activity or punish the violators. Although the National Command Authorities' approval is not required prior to an attack on a legitimate target that may cause the incidental death or injury of a head of state, the National

Command Authorities should expressly approve the direct attack against the enemy head of state under the circumstances mentioned above.

Generally, the basic precept of fairness would dictate that such criminality by the enemy head of state be determined by the judicial system to ensure he received an impartial hearing. However, during a period of general armed conflict or when acting in self-defense, a careful inquiry by the National Command Authorities should be sufficient where the safety of Americans or allies require immediate action and personal jurisdiction over the enemy head of state cannot be promptly secured. In other words, the enemy head of state should not be permitted to exploit his violations of international law by requiring the United States or her allies to judicially litigate such issues before relying on self-defense to protect their vital interest. Moreover, the United States and her allies cannot handle their national security interest during an armed conflict as though they are solely legal demands to be discarded unless they can be confirmed in open court, nor can they afford to disclose sensitive information or jeopardize their intelligence sources.

Finally, it is unreasonable to contend as a legal or moral tenet that a head of state who is responsible for waging a war of aggression must be shielded from attack. For to do so is to contend that it is preferable to subject thousands of combatants to death rather than kill one individual who could be tried for war crimes and sentenced to death, if captured. Furthermore, if

a war of aggression could be averted or its end accelerated by killing the head of state who initiated the war, the proportionality principle would reinforce a conclusion that it is inexcusable to subject thousands of combatants to death to protect such a leader. Therefore, with the National Command Authorities' approval, General Schwarzkopf could have designated Saddam Hussein as a specific target during the Gulf Conflict without violating Executive Order 12333, the Hague Conventions, the Geneva Conventions, or the United Nations Charter.

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